Malaysian European Production System Sdn Bhd v Zurich Insurance (M) Bhd

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12-376 OF 2002
KAMALANATHAN RATNAM J
6 JANUARY 2003

Arbitration — *Stay of proceedings — Application — Steps taken in proceedings — Dispute between parties to refer matter to arbitration as stated in the insurance policy — Whether the defendant had taken a step in the proceedings — Whether sessions court had power to grant stay — Whether there was any dispute to refer to arbitration — Arbitration Act 1952 s 6*

The plaintiff bought a insurance policy from the defendant designed to cover the insured's death and if death or disablement occured, then the insured's estate or the insured was entitled to a sum except if the death or disablement resulted directly or indirectly from suicide or attempted suicide. During the period cover, one of the plaintiff's employees ('the insured') died due to 'pulmonary oedema due to acute drowning'. The plaintiff informed the defendant of this fact by a fax message and further filed this suit against the defendant on 22 May 2002 and the first return date of the summons was on 17 July 2002. On 11 June 2002, the plaintiff served by registered post the summons on the defendant. The defendant's solicitors then sent a letter purportedly dated 16 February 2002, ie before the summons was filed, asking for an extension of time to file its defence. Whilst this wrongly dated letter requested the plaintiff's solicitors to serve the summons on them, the plaintiff's solicitor's clerk had in the meantime filed an affidavit of service on 19 June 2002 confirming that he had served the summons on the defendant by AR Registered post. On 4 September 2002, the defendant filed an application to stay all proceedings and to refer the matter to arbitration as stated in the policy of insurance. The learned sessions court judge granted an order in terms of the defendant's application. Dissatisfied with that decision, the plaintiff appealed. The issues for the court's determination were whether: (i) the defendant had taken a step in the proceedings when it asked for an extension of time in the letter dated 16 February 2002; (ii) the sessions court had power to grant the stay; and (iii) there was any dispute to refer the matter to arbitration as stated in the policy insurance.

Held, dismissing the appeal with costs:

(1) Since the plaintiff had consented to the defendant's request for extension of time and since application for a stay of proceedings was filed before the next return date and the plaintiff who had indeed served the summons as early as on 11 June 2002 on the defendant personally, had failed to take judgment on 17 July 2002 or the next return date, the defendant had not, by merely writing the letter dated 16 February 2002, taken any step in the

proceedings within the meaning of s 6 of the Arbitration Act 1952 ('the Act') (see pp 311H–312A); *Ford's Hotel Co v Bartlett* [1896] AC 1 and *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625 followed.

(2) Section 6 of the Act is specific. The words 'any party to the legal proceedings may ... apply to the court' must logically mean, the court in which the proceedings had been commenced. That is why whilst all other sections in the Act make reference to the High Court, it is only s 6 that does not refer to the High Court. It merely says 'apply to the court'. If the said section is to bear the meaning given by the plaintiff, then there is no reason why the legislators when formulating this section had not said 'apply to the High Court'. Since the words 'High Court' have been specifically left out, then it was not for this court to read otherwise into the Act. In the circumstances, the application for stay had been properly taken in the sessions court (see p 312F–H).

(3) The relevant portion to consider in the arbitration clause were the words 'all differences arising out of this policy'. It was clear that there was a difference of opinion out of this policy. The plaintiff said that the death was accidental and thus was covered by the policy. The defendant said that the death was caused by suicide. There could be no clearer instance of a difference between the parties. What is essential is that the court should, on the material before it, be in a position to express its satisfaction that the defendant is ready and willing to do all things necessary to the proper conduct of the arbitration. The available evidence in this case clearly supported the inference that the defendant was ready and willing to do all things necessary to refer the matter to arbitration (see p 313C–F); *Accounting Publications Sdn Bhd v Ho Soo Furniture Sdn Bhd* [1998] 4 MLJ 497 followed.

[Bahasa Malaysia summary

Plaintif telah membeli satu insurans polisi daripada defendan dengan tujuan melindungi kematian pengambil insurans dan jika kematian atau kehilangan upaya berlaku, maka waris pengambil insurans atau pengambil insurans berhak kepada sejumlah wang kecuali jika kematian atau kehilangan upaya tersebut adalah secara langsung atau tidak langsung akibat daripada bunuh diri atau percubaan membunuh diri. Dalam tempoh perlindungan tersebut, salah seorang daripada pekerja plaintif ('pengambil insurans') telah mati akibat 'pulmonary oedema due to acute drowning'. Plaintif telah memaklumkan kepada defendan tentang fakta ini melalui satu pesanan faks dan selanjutnya memfailkan guaman ini terhadap defendan pada 22 Mei 2002 dan tarikh pulangan pertama saman tersebut adalah pada 17 Julai 2002. Pada 11 Jun 2002, plaintif telah menyampaikan saman tersebut melalui pos berdaftar ke atas defendan. Peguamcara defendan kemudian telah menghantar sepucuk surat yang dikatakan bertarikh

16 Februari 2002, iaitu sebelum saman tersebut difailkan dan telah meminta perlanjutan masa bagi membolehkan ia memfailkan pembelaannya. Sementara surat yang bertarikh salah tersebut meminta peguamcara plaintiff menyampaikan saman tersebut ke atas mereka, kerani peguamcara plaintif telah pada masa yang sama memfailkan satu afidavit penyampaian pada 19 Jun 2002 mengesahkan bahawa beliau telah menyampaikan saman tersebut ke atas defendan melalui pos AR Berdaftar. Pada 4 September 2002, defendan telah memfailkan satu permohonan untuk menggantung semua prosiding dan untuk merujuk perkara tersebut kepada timbangtara sebagaimana yang dinyatakan dalam insurans polisi tersebut. Hakim mahkamah sesyen yang arif telah membenarkan perintah seperti yang dipohon dalam permohonan defendan. Berasa tidak puas hati dengan keputusan tersebut, plaintif telah merayu. Persoalan-persoalan untuk ditentukan oleh mahkamah adalah sama ada: (i) defendan telah mengambil langkah dalam prosiding bila ia meminta perlanjutan masa melalui surat bertarikh 16 Februari 2002 tersebut; (ii) mahkamah sesyen mempunyai kuasa untuk membenarkan penggantungan tersebut; dan (iii) terdapat apa-apa pertikaian untuk merujuk perkara tersebut kepada timbangtara sebagaimana yang dinyatakan dalam insurans polisi tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Memandangkan plaintif telah bersetuju dengan permintaan defendan untuk lanjutan masa dan memandangkan permohonan untuk satu penggantungan prosiding telah difailkan sebelum tarikh pulangan berikutnya dan plaintif yang telahpun menyampaikan saman tersebut seawal 11 Jun 2002 ke atas defendan sendiri tetapi telah gagal untuk mendapatkan penghakiman pada 17 Julai 2002 atau tarikh pulangan berikutnya, defendan tidak boleh dianggap, dengan hanya menulis sepucuk surat bertarikh 16 Februari 2002 tersebut, telah mengambil apa-apa langkah dalam prosiding bagi maksud s 6 Akta Timbangtara 1952 ('Akta tersebut') (lihat ms 311H–312A); *Ford's Hotel Co v Bartlett* [1896] AC 1 dan *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625 diikut.

(2) Seksyen 6 Akta tersebut adalah spesifik. Perkataan-perkataan 'any party to the legal proceedings may ... apply to the court' secara logiknya bermaksud, mahkamah di mana prosiding tersebut dimulakan. Itu adalah sebabnya tatkala semua seksyen lain dalam Akta tersebut merujuk kepada Mahkamah Tinggi, hanya s 6 tidak merujuk kepada kepada Mahkamah Tinggi. Ia hanya menyatakan 'apply to the court'. Sekiranya seksyen tersebut membawa maksud seperti yang diberikan oleh plaintif, maka tiada sebab untuk badang perundangan semasa membentuk seksyen ini tidak menyatakan 'apply to the High Court'. Memandangkan perkataan-perkataan 'High Court' secara spesifiknya tidak dimasukkan, maka ia bukanlah untuk mahkamah ini membaca

sebaliknya ke dalam Akta tersebut. Dalam keadaan sedemikian, permohonan untuk penggantungan tersebut adalah tindakan betul di hadapan mahkamah sesyen (lihat ms 312F–H).

(3) Bahagian yang relevan untuk dipertimbangkan dalam klausa timbangtara tersebut adalah perkataan-perkataan 'all differences arising out of this policy'. Adalah jelas bahawa terdapat pendapat yang berbeza tentang polisi ini. Plaintif menyatakan bahawa kematian tersebut adalah satu kemalangan dan oleh itu dilindungi oleh polisi tersebut. Defendan menyatakan bahawa kematian tersebut adalah akibat bunuh diri. Tiada keadaan yang lebih jelas tentang satu perbezaan antara pihak-pihak tersebut. Apa yang penting adalah mahkamah hendaklah, berdasarkan bahan di hadapannya, berada dalam kedudukan untuk menyatakan kepuasannya yang defendan bersedia dan berkesanggupan untuk membuat apa yang perlu bagi satu tindakan timbangtara yang betul. Keterangan yang ada dalam kes ini dengan jelas menyokong inferens bahawa defendan bersedia dan berkesanggupan membuat apa yang perlu untuk merujuk perkara tersebut ke timbangtara (lihat ms 313C–F); *Accounting Publications Sdn Bhd v Ho Soo Furniture Sdn Bhd* [1998] 4 MLJ 497 diikut.]

Notes

For cases on application for stay of proceedings, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1016–1033.

Cases referred to

Accounting Publications Sdn Bhd v Ho Soo Furniture Sdn Bhd [1998] 4 MLJ 497 (refd)

Brighton Marine Palace & Pier Ltd v Woodhouse [1893] 2 Ch 486 (refd)

Ford's Hotel Co v Bartlett [1896] AC 1 (folld)

Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd [1999] 2 MLJ 529 (refd)

Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor [2002] 2 MLJ 625 (folld)

Trans Resources Corp Sdn Bhd v Sanwell Corp & Anor (No 2) [1999] 2 MLJ 609 (refd)

Usahabina v Anuar bin Yahya [1998] 7 MLJ 691 (refd)

Legislation referred to

Arbitration Act 1952 s 6

Rules of the High Court 1980 O3 r 5(3), O 12 rr 6, 7

Appeal from: Civil Suit No 52–1131 of 2002 (Sessions Court 2, Pulau Pinang)

Simon Tan (*Lee Hean Cheng & Co*) for the plainitff/appellant.

P Ramanathan (*VP Nathan & Partners*) for the defendant/respondent.

Kamalanathan Ratnam J:

Facts

The plaintiff bought a Group Personal Accident Policy from the defendant and paid a premium of RM1,989.13. The policy covered the insured namely the insured person named or referred to in the specification of Insured Persons (Insured). The policy, inter alia, was designed to cover the insured's death during the period of cover and if death or permanent disablement occurred, then in either case, the insured's estate or the insured was entitled to a sum of RM120,000. However, one of the exceptions to the payment was if the death or disablement resulted directly or indirectly from suicide or attempted suicide. On 26 March 2000 which was during the period of cover, one of the plaintiff's employees ('the insured'), Barbara a/p Anthony Dass died and the death certificate issued by the Government Hospital showed the cause of death as 'pulmonary oedema due to acute drowning'. On 28 March 2000, the plaintiff informed the defendant of this fact by a fax message.

Unfortunately, no other correspondence has been enclosed in the appeal record to show when the defendant actually repudiated liability to the plaintiff. There must have been a repudiation because the plaintiff filed this suit against the defendant on 22 May 2002 and the first return date of the summons was on 17 July 2002. On 11 June 2002, the plaintiff served by registered post the said summons on the defendant.

The next relevant letter exhibited by the parties is a letter from the defendant's solicitors to the plaintiff and purportedly dated 16 February 2002. I cannot understand why the defendant's solicitors dated the letter even before the summons was filed, and yet stated the correct summon number on the said letter. As the facts would unfold, the contents of this letter are very important to both parties. This letter is reproduced for its contents.

> VP NATHAN & PARTNERS
> PEGUAMBELA DAN PEGUAMCARA
> YOUR REFERENCE: L/274/2001/LHC/ST
> WHEN REPLYING PLEASE
> QUOTE OUR REFERENCE: VPN/PRM/RN/SM/B 15202P 16/2/2002
>
> M/s Lee Hean Cheng & Co.
> Advocates & Solicitors,
> No 41-5-3, 5th Floor,
> Wisma Prudential,
> Jalan Cantonment,
> 10250 Penang.
>
> ATTENTION: MR. SIMON TAN
> FAX/POST
>
> Dear sirs,
>
> Re: Penang Sessions Court (2) Civil Action No 52–1131–2002
>
> We refer to the telephone conversation between our Mr PR Manecksha and your Mr Simon Tan this afternoon.
>
> We shall be obliged if you will serve on us a copy of the summons and statement of claim as we have instruction to enter appearance and file a defence.

A We confirm that you will get as a mention on behalf on 2 August 2002 and give us at least one month to enable us to file the defence.

We thank you for your indulgence.

In the meantime please note that the reference for this file is B 39202P and shall be obliged if you will use same in all future correspondence.

B Kindly, update your records.
Yours faithfully,
Sgd.

Whilst this wrongly dated letter requests the plaintiff's solicitors to serve the summons on them, the plaintiff's solicitor's clerk had in the meantime filed C an affidavit of service on 19 June 2002 confirming that he had served the summons on the defendant by AR Registered post.

In the meantime on 4 September 2002, the defendant filed an application to stay all proceedings and to refer the matter to arbitration as stated in the policy of insurance. The learned sessions court judge granted an order in terms of the defendant's application. Dissatisfied with that D decision the plaintiff has appealed.

Findings of the court

The plaintiff raised three issues on appeal before me.

E (1)That the defendant had taken a step in the proceedings

It was the plaintiff's contention that having written the letter dated 16 February 2002 and in which the defendant had sought and obtained an extension of 'at least one month to enable us to file the defence', the defendant had taken a step in the proceedings. The plaintiff relied heavily F upon the recent decision of the Federal Court in *Sanwell Corp v Trans Resources Corp Sdn Bhd & Anor* [2002] 2 MLJ 625. I heard *Sanwell*'s case at first instance (see *Trans Resources Corp Sdn Bhd v Sanwell Corp & Anor (No 2)* [1999] 2 MLJ 609). I held that the entry of a conditional appearance pursuant to O 12 rr 6 and 7 of the Rules of the High Court 1980 ('the G RHC') is only available to cases where the defendant complained of an irregularity or defect in the originating process or service of the process upon him and/or where the defendant alleges that the court is without jurisdiction to deal with the dispute. I further held that the entering of an unconditional appearance could not amount to a waiver of the defendant's right to proceed to arbitration on the basis that the plaintiff's filing of the H civil suit did not amount to either an irregularity or a defect in the writ or service thereof and in opposing the action it had not been the first defendant's contention that the court has no jurisdiction to deal with the dispute. It must be noted that in *Sanwell*'s case, the defendant did not ask for nor apply to court for an extension of time to file the defence. In deciding as I did, I did not follow the decision of another High Court in *Usahabina v* I *Anuar bin Yahya* [1998] 7 MLJ 691. In *Usahabina*, the contractor who agreed to build a house sued the house owner to recover his cost. The defendant owner having entered a conditional appearance because of the

existence of an arbitration clause failed to file his defence within the stipulated period. However, the plaintiff contractor allowed by letter, the defendant's request for an extension of one week to file the defence. Since the defendant had failed to file the defence within the extended period, the plaintiff entered judgment in default of defence. Soon thereafter, the defendant applied by summons to set aside the judgment in default and to stay all proceedings pending reference to arbitration. On these facts, the High Court held that the defendant's request for extension of time to file his defence did not amount to the taking of any steps in the proceedings. However, the court went on to hold that the filing of an unconditional appearance meant that the defendant had elected to allow the action to go on and had accordingly submitted to the jurisdiction of the court and that this amounted to a step in the proceedings thereby precluding the defendant from obtaining an order staying the proceedings.

In *Interscope Versicherung Sdn Bhd v Sime Axa Assurance Bhd* [1999] 2 MLJ 529, the Court of Appeal upheld the decision in *Usahabina*. I must admit that when I decided *Sanwell*, I did not have the benefit of the decision of the Court of Appeal in *Interscope*. However when *Sanwell* went up to the Court of Appeal, the Court of Appeal relied on its own decision in *Interscope* and reversed *Sanwell*. The Federal Court in hearing *Sanwell*, very meticulously went through each of these cases and decided that the entry of appearance was a mandatory procedural step to be taken by an applicant in proceedings in the High Court. It was a step in the proceedings as required by the RHC. However, it was a permitted, excluded or an exempted step in the proceedings that did not amount to a step in the proceedings within the meaning of s 6 of the Arbitration Act 1952 ('the Act') which would prejudice the applicant's right to apply for a stay of the proceedings. The Federal Court went on to hold that if the applicant had served any pleadings, then he had clearly taken a step in the proceedings within the meaning of s 6 of the Act, since he has elected to proceed with the proceedings in the High Court and would therefore be barred from applying for a stay of proceedings to refer the dispute to arbitration. However, the Federal Court went on to hold that if the applicant had taken any other action in the proceedings other than steps of entering appearance or serving pleadings, the court would then have to consider whether such action amounted to a step in the proceedings by determining the nature of the action and whether or not it indicated an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed off by arbitration.

Relying on the decision of the Federal Court, the plaintiff argued that by applying and obtaining an extension of time to file the defence, the defendant had indicated an unequivocal intention to proceed with the suit and had therefore abandoned the right to have the dispute disposed off by arbitration. Having considered carefully the arguments of the plaintiff, I do not agree with this view. As very succinctly explained by Mohtar Abdullah FCJ in *Sanwell*, the defendant only applied to stay proceedings after it had failed to file the defence within the extended period of time given to it and after the plaintiff had obtained judgment. By then it was too late.

From reading the judgment of the Federal Court in *Sanwell*, it becomes clear that the defendant had two choices upon receipt of extension of time. He could have filed the defence or he could have within the extended time applied for a stay without taking any other step.

In *Brighton Marine Palace & Pier Ltd v Woodhouse* [1893] 2 Ch 486, North J held that asking for time by letter is not taking a step in the action; it is taking a step outside the action altogether. I agree with this proposition of the law. The defendant can apply for extension of time pursuant to O 3 r 5 of the RHC. It is pertinent to reproduce O 3 r 5 which reads as follows:

> 5 Extension, etc of time
>
> (1) The court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules or by any judgment, order or direction, to do any act in any proceedings.
>
> (2) The court may extend any such period as is referred to in para (1) although the application for extension is not made until after the expiration of that period.
>
> (3) The period within which a person is required by these rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the court being made for that purpose.
>
> (4) ...

Since sub-r (3) provides for written consent by a letter without the need for an order of court, I hold that having given the written consent, the plaintiff cannot now seek to argue that the granting of the consent must be held against the defendant. Of course, the application by letter dated 16 February 2002 was made under sub-r (3) which provides for enlargement of time without taking any step in the proceedings. It is clear that the very object of sub-r (3) is to enable the parties to enlarge time by consent without the need to apply to court and thus taking a step in the proceedings. However, if the plaintiff had refused the application for extension of time then the defendant would have been compelled to apply to court and this would be tantamount to taking a step in the proceedings. This view becomes all the more clear with the Federal Court's reference to the case of *Ford's Hotel Co v Bartlett* [1896] AC 1. In *Ford's Hotel Co*, the House of Lords held that when a defendant took out a summons or obtained an order for further time to deliver his defence, he is deemed to have taken a step in the proceedings within the meaning of the Act and was not afterwards entitled to apply for a stay on the ground that the proceedings were brought in respect of a matter agreed to be referred to arbitration.

In the circumstances, it is my judgment that since the plaintiff had consented to the defendant's request for extension of time and since application for a stay of proceedings was filed before the next return date and the plaintiff who had indeed served the summons as early as on 11 June 2002 on the defendant personally, had failed to take judgment on 17 July 2002 or the next return date, the defendant had not, by merely writing the

letter dated 16 February 2002, taken any step in the proceedings within the meaning of s 6 of the Act.

(2) Sessions court has no power to grant a stay

To fully appreciate this argument of the plaintiff, it is necessary to reproduce s 6 of the Act which reads as follows:

> Power to stay proceedings where there is submission to arbitration
>
> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The plaintiff's case is that the sessions court does not have the jurisdiction to give an order to refer the matter to arbitration. This is because the 'High Court' as defined in the Act means the High Court in Malaya or the High Court in Sabah or Sarawak as the case may require. Further the plaintiff argued that all references to 'court' in the Act, referred to the High Court. The plaintiff also pointed out that O 69 of the RHC governs arbitration proceedings and that there are no such provisions in the Subordinate Courts Rules 1980. Counsel for the plaintiff argued that the defendant ought to have applied by way of an originating motion to the High Court for a stay of proceedings under s 6 of the Act and that the defendant ought not to have applied in the sessions court itself.

I do not accept this argument. Section 6 of the Act is specific. The words 'any party to the legal proceedings may ... apply to the court' must logically mean, the court in which the proceedings had been commenced. That is why whilst all other sections in the Act make reference to the High Court, it is only s 6 that does not refer to the High Court. It merely says 'apply to the court'. If the said section is to bear the meaning given by the plaintiff, then there is no reason why the legislators when formulating this section had not said 'apply to the High Court'. Since the words 'High Court' have been specifically left out, then it is not for this court to read otherwise into the Act.

In the circumstances, it is my judgment that the application for stay has been properly taken in the sessions court.

(3) There is no dispute

The plaintiff argued that there is no dispute at all to refer the matter to arbitration since it is the plaintiff's case that the plaintiff can only claim if the death occurred as a result of an accident and the plaintiff points out that that is also the defence's case.

The clause relating to arbitration as found in the policy reads as follows:

> 10 Arbitration
>
> All differences arising out of this policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator, to the decision of two Arbitrators one to be appointed in writing by each of the parties, within one (1) calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree, of an Umpire appointed in writing by the Arbitrators before entering upon the reference.
>
> The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the company. If the company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within twelve (12) calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein then the claim shall for all purposes be deemed to have abandoned and shall not thereafter be recoverable hereunder.

To my mind, the relevant portion to consider are the words 'all differences arising out of this policy'. It is clear that there has arisen a difference of opinion out of this policy. The plaintiff says that the death is accidental and thus is covered by the policy. The defendant says that the death was caused by suicide. There can be no clearer instance of a difference between the parties. In *Accounting Publications Sdn Bhd v Ho Soo Furniture Sdn Bhd* [1998] 4 MLJ 497, the Court of Appeal had said that what is essential is that the court should, on the material before it, be in a position to express its satisfaction that the defendant is ready and willing to do all things necessary to the proper conduct of the arbitration. The Court of Appeal emphatically has stated that at such an early stage, there is little a defendant is obliged to do in the arbitration beyond asserting a willingness to appoint an arbitrator. The available evidence in the case before me clearly supports the inference that the defendant is ready and willing to do all things necessary to refer the matter to arbitration.

Whilst I agree that this case is one that is eminently suited for trial before a court, yet it is imperative that the court must agree with the views expressed by the parties in the policy that they would rather arbitrate than litigate.

In the circumstances, this appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by Ezatul Zuria Azhari